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JAMES E. DOYLE  
ATTORNEY GENERAL

Patricia J. Gorence  
Deputy Attorney General

March 2, 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221

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MAR 05 1993

The Federal Communications Commission  
1919 M. St., N.W.  
Washington, D.C. 20554

FCC MAIL ROOM

Re: Implementation of the Cable Television Consumer  
Protection Act. MM Docket 92-266 - Negative Option  
Billing

Dear Sir or Madam:

The purpose of this letter is to respond to certain of the comments filed by Tele-Communications, Inc. (TCI), in this docket. I recognize that this filing is made after the February 11, 1993, deadline for replies, but the matter was not brought to our attention until after that date.

As Attorney General, I believe that TCI's comments conflict with congressional intent on the subject of negative options.<sup>1</sup> Specifically, this response relates to sec. 623 (f) of the Cable Act and TCI's comments at pp. 64-67.

At page 65, TCI refers to congressional concern about negative option billing as limited to a "reaction to the initial roll-out by TCI of a new mini-pay service [i.e. ENCORE]" that involved billing after a "free trial."<sup>2</sup> TCI then claims that sec. 623 (f) is,

<sup>1</sup> Wisconsin is currently litigating the propriety of TCI's billing practices, including its prior negative option offerings, under state unfair trade practice laws. Requested relief is a prospective injunction mandating the implementation of fair billing procedures. A decision is pending.

<sup>2</sup> The "free trial" in connection with ENCORE was imposed on all cable customers by including it as part of the basic service. "Free" offers do, however, create an area of enforcement concern for the Commission in cases where a service is ordered "by name" by a customer in response to a "free" offer and the cable operator later uses negative option procedures to implement a charge for the service on the grounds that the service had been previously ordered "by name", as required by sec. 623 (f). It is not clear that this practice is covered by sec. 623 (f), but it may well be an evasion under sec. 623 (h). The Federal Trade Commission has recognized the unique import of a "free" offer; see e.g. 16 CFR § 251 and Golden Fifty Pharmaceutical et al 77 FTC Decisions at 290.

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therefore, "designed to reach only this [ENCORE] type of activity;" and states, at p. 66, that the Commission:

must expressly clarify that the unbundling, retiering and repackaging of services and equipment are not within the negative option prohibition.

The explicit declaration of legislative intent is directly to the contrary. The conference committee legislative history relative to the ban on negative options, from the Congressional Record of September 14, 1992, page H8324, states:

The language of section 623(f) from the House amendment regarding negative option billing is replaced with the language in Section 24 of the Senate bill. The language adopted by the conferees insures that cable operators will not be able to charge customers for tiers or packages of programming services or equipment that they do not affirmatively request, as well as individually priced programs or channels. (emphasis supplied)

The House amendment was limited to ENCORE type proposals. The Senate version, which was ultimately enacted, was not. In addition to the conference committee report, it is clear from the language of sec. 623 (f) that a cable operator cannot bill a customer for "any service or equipment" absent an "affirmative request" for that service or equipment "by name."

Our concerns go beyond the stand alone offer of the ENCORE movie channel because of TCI's use of negative option billing practices to introduce an optional tier of services, Expanded Basic. When introduced, this tier was made up of channels which were once part of basic service, i.e. prior to this retiering, the customer had no choice over which of the channels in the basic service he or she could select and pay for. Either basic was selected in its entirety or the customer did not get cable service. Expanded Basic gave the customer the choice of taking the now unbundled channels - along with the basic service - or reverting to a less expensive basic service, minus the unbundled channels.

TCI introduced Expanded Basic in the same way it intended to introduce the ENCORE channel - without affirmative customer choice. At the time of introduction, Expanded Basic had not been ordered, by name, by any cable customer. After notice, this new service was simply included on the customer's invoice as a line charge and its price included in the "amount due" stated on the invoice. At the time of implementation in Wisconsin (early 1990), the price of basic service was reduced from \$17.45 to \$17.05 and the initial

charge for Expanded Basic was \$.40.<sup>3</sup> Since then, however, basic has increased to \$20.10 and Expanded Basic to \$1.75.

TCI has recently announced that basic will now be \$10 and the existing Expanded Basic service (which now will contain about 19 channels, up from its previous 5 channels) will be \$11.85. This latest proposal (effective March 1, 1993) does not, as to existing customers, involve the introduction of an unordered service. Instead, it involves a significant reconfiguration of a previously ordered service and a substantial price increase.<sup>4</sup>

This most recent proposal has been referred to as the "repackaging" of an existing service, as opposed to an unbundling or retiering of channels from basic service into a new optional service, such as was done in the initial offering of Expanded Basic. A repackaging of Expanded Basic may well not fall within the purview of sec. 623 (f), since the customer had previously ordered<sup>5</sup> the service by name. The Wisconsin Department of Justice has not challenged this practice as an unfair negative option but rather as a price increase - subject to certain "fair" notice and cancellation procedures which must be provided before the price increase is implemented.

TCI, at p. 66 of its comments, blurs the distinction between "unbundling or retiering" previously unordered services and "repackaging" an existing service. There is a difference between the two and the reasons not to include "repackaging" in the

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<sup>3</sup> This results in what TCI refers to as a "revenue neutral" proposal. TCI seems to claim that negative option billing of a revenue neutral proposal is of no enforcement concern, even though it results in the customer selecting an optional service (consisting of channels once in basic service and subject to the rate regulation referenced in the new Cable Act) and even though the initial price may be artificially low, only to be increased after the customer's negative option "acceptance" of the service.

<sup>4</sup> This raises the question whether TCI's introduction of a substantially changed optional service is included in the "evasions, including evasions that result from retiering" mentioned in sec. 623 (h) of the Act. This is a matter for serious consideration by the Commission.

<sup>5</sup> Actually, as indicated, Expanded Basic was not in fact affirmatively ordered by persons subscribing to TCI's cable service at the time it was introduced. We assume that, if the Act is interpreted as congress indicated, this would not be the case in the future.

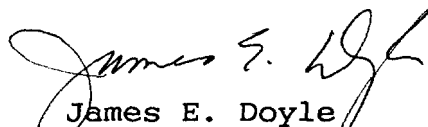
negative option prohibition should not carry over to "unbundling or retiering," at least in the context used here.

I urge that the congressional policy be left intact and that the Commission make it clear that all discrete cable services and equipment must be affirmatively ordered by name prior to billing a cable customer for that service or item of equipment. I also urge the Commission to deal with evasions of sec. 623 (f) which may occur in cases where the customer orders a service at a time when there are no (or minimal) price implications.

Telecommunication is about to explode in terms of its importance to all citizens. Already over 60 percent of the public receives cable television. Given the fact that cable television is not considered a public utility, adequate regulation of all facets of its impact on the consuming public is a critical necessity. This is particularly true now that Congress has referenced its recent legislation as a "Cable Television Consumer Protection Act."

Thank you for your consideration and attention to these matters.

Sincerely,

  
James E. Doyle  
Attorney General

JED:BAC:cl

cc: Attorney General Robert A. Butterworth  
Senator Slade Gorton  
Ms. Lynne Ross, NAAG